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Karen Tokarz

Washington University School of Law

Annette Ruth Appell

Washington University School of Law

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Washington University Journal of Law & Policy

New Directions in ADR and Clinical Legal Education

Introduction

Karen Tokarz^{*}

Annette Ruth Appell^{**}

This volume on “New Directions in ADR and Clinical Education” continues a rich tradition of clinical scholarship, published by the *Washington University Journal of Law & Policy*, in collaboration with the Clinical Education Program. Over the past decade, the *Journal of Law & Policy* has aspired to become a leading publisher of scholarship on clinical legal education and practice and has published many important articles by top clinical legal educators and practitioners.¹ This collaboration has produced groundbreaking

^{*} Charles Nagel Professor of Public Interest Law and Public Service and Director, Dispute Resolution Program, Washington University School of Law, St. Louis, Missouri.

^{**} Professor of Law and Associate Dean for Clinical Affairs, Washington University School of Law, St. Louis, Missouri.

1. Clinicians who have published articles in the *Journal* include Jane Aiken, Jim Anaya, Margaret Martin Barry, Frank Bloch, Brenda Bratton Blom, Juliet Brodie, Susan Brooks, Luke Cole, Kim Connolly, Nancy Cook, Ken Feinberg, Lynda Frost, Martin Geer, Toby Golick, Leigh Goodmark, Danny Greenberg, Maureen Hackett, Carol Harding, Carolyn Copps Hartley, Bill Ong Hing, Elizabeth (Liz) Hubertz, Emily Hughes, Eric James, Mike Jenuwine, Susan Jones, Peter Joy, Ann Juergens, Helen Kang, Catherine Klein, Kate Kruse, Bob Kuehn, Ved Kumari, Janet Lessem, Antoinette Sedillo Lopez, Angela McCaffrey, Mary Medcalf, Carrie Menkel-Meadow, Charles Ogletree, Michael Perlin, Jean Koh Peters, Carrie Petrucci, Bill Quigley, Mae Quinn, Asha Ramgobin, Spencer Rand, Dina Schlossberg, Abbe Smith, Jane

volumes on “Interdisciplinary Teaching and Practice” (volumes 11 and 14); “Poverty, Justice, and Community Lawyering” (volume 20); and “Access to Justice” (volumes 1, 4, 7, 10, 12, 16, 19, 22, 25, 31). In 2008, the Clinical Program and the *Journal* published “New Directions in Clinical Legal Education” (volume 28), the prequel to this volume.²

In winter 2009, the Washington University Dispute Resolution Program joined forces with the Clinical Education Program and the *Journal* to host a roundtable on “New Directions in Alternative Dispute Resolution (ADR) and Clinical Legal Education.” The participants explored exciting, emerging issues in dispute resolution and clinical education, and this remarkable volume is the product of that roundtable.

The authors in this volume are in the forefront of innovative teaching, practice, and scholarship in dispute resolution and clinical education. In their articles, they eloquently highlight the important goals shared by dispute resolution and clinical legal education—to foster creative problem solving, to empower clients and advance the interests of parties, to promote social justice, and to enhance ethical practice and professionalism. The authors illuminate new and exciting ways in which dispute resolution and clinical education, jointly and severally, can inform, improve, and reform not only legal education, but also the practice of law, the legal profession, and systems of justice.

Perhaps more than any other time in history, the practice of law is changing in unexpected ways, new professional roles for lawyers are evolving, and legal education is under intense pressure to undertake curricular reforms. “ADR—an umbrella term for a range of dispute resolution processes outside the courts that includes negotiation, conciliation, mediation, dialogue facilitation, consensus-building, and arbitration—has emerged as a principal mode of legal practice in virtually every legal field and in virtually every country in the

Spinak, Nina Tarr, Tony Thompson, Karen Tokarz, Rose Voyvodic, Anita Weinberg, and Steve Wizner.

2. All of these volumes can be accessed at <http://law.wustl.edu/journal/pages.aspx?ID=703>.

world.”³ Litigation is no longer the default method of resolution of legal disputes. Almost all law schools in the United States and elsewhere now offer dispute resolution, as well as clinical courses. A few schools even require students to take one or the other before graduation. And some law schools have gone one step further—developing dispute resolution clinics or community lawyering clinics that embrace dispute resolution skills and values.

Many legal educators believe these curricular reforms are essential if we are to prepare graduates to practice in a legal world in which negotiation, mediation, and other forms of dispute resolution are everyday occurrences. Some argue that clinical legal education needs to incorporate dispute resolution to introduce students to multiple lawyering skill sets and strategies, to counteract “the risks of acculturation to adversarial modes of thinking”⁴ that might develop by offering only litigation-focused clinics, and to heighten the development of a social justice consciousness in our law students.

Perhaps [the growth in these new types of clinics] is because the problems of the “un” and “under” represented are growing in new directions, requiring more complex models of response. Perhaps this is because of prior misconceptions that social and economic problems could be solved with individual strategies, and because of new insights about the integrative nature of social and economic injustice. Perhaps this is because of an increased recognition of the need for collaborative problem solving and dispute resolution as lawyering strategies, and new perspectives on the capacities of law clinics to teach these modes of practice. Perhaps this is because of a renewed investment on the part of law schools to teach social justice lawyering.⁵

3. Karen Tokarz & V. Nagaraj, *Advancing Social Justice Through ADR and Clinical Legal Education in India, South Africa, and the United States*, in *THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE* 253 (Frank Bloch ed., 2010).

4. Matthew Osborne, *Alternative Dispute Resolution and Clinical Legal Education in Australian Law Schools: Convergent, Antagonistic, or Running in Parallel?*, 14 *J. PROF. LEGAL EDUC.* 97, 101 (1996).

5. Karen Tokarz, Nancy L. Cook, Susan Brooks & Brenda Bratton Blom, *Conversations on “Community Lawyering”: The Newest (Oldest) Wave in Clinical Legal Education*, 28

The four overarching themes that unite this symposium are shared by both clinical legal education and alternatives to adversarial dispute resolution: advancing social justice, fostering creative problem solving, valuing the interests of the parties, and promoting ethics and professionalism. In our view, the scholarship in this volume is a superb example of why dispute resolution and clinical scholarship is important to both legal education and legal practice, why dispute resolution and clinical faculty should write, and how this work significantly and uniquely benefits the academy and the profession.

* * *

In Jonathan Hyman's thoughtful Article, *Four Ways of Looking at a Lawsuit: How Lawyers Can Use the Cognitive Frameworks of Mediation*,⁶ he examines in depth the tensions that can arise between lawyers and mediators when they mediate. He suggests these tensions are more deeply rooted than just differing roles, goals or tactics. Rather, he postulates they arise from different "cognitive frameworks" about the nature of conflict and the ways to deal with it—that then lead to different perceptions. These frameworks (which he also terms "mental maps" or "rhetorical tropes") include distributive compromise, value-creating, relationship repairing, and mutual understanding. In his view, while mediators frequently move through all four frameworks, lawyers tend to be limited to the first.

Hyman describes the four cognitive frameworks in detail and compares them to other conceptual taxonomies that have been proposed by others. He argues that legal reasoning and lawyers' mental habits should not disable lawyers from adopting one or more alternative frameworks, and he provides diagnostic tools for identifying a framework in operation. In the end, he makes a persuasive case why lawyers should inhabit these alternative frameworks. In addition to avoiding or managing conflict between lawyers and mediators, he argues that lawyers who recognize and utilize alternative frameworks can significantly benefit their clients, our system of disputing, and justice.

WASH. U. J.L. & POL'Y 359, 401 (2008).

6. Jonathan M. Hyman, *Four Ways of Looking at a Lawsuit: How Lawyers Can Use the Cognitive Frameworks of Mediation*, 34 WASH. U. J.L. & POL'Y 11 (2010).

Carol Izumi's Article, *Implicit Bias and the Illusion of Mediator Neutrality*,⁷ provides a reflective analysis of the complex challenges of a mediator's ethical duty to mediate in a neutral manner against the behavioral realities of mediator thought processes, actions, motivations, and decisions. She explores the science of implicit social cognition and its application to mediation, and concludes that what actually constitutes neutrality is not clearly understood nor actualized. She then turns to one racial category, Asian Americans, to tease out ways in which implicit bias might affect mediators' "neutrality."

According to Izumi, there is an unacceptable gap between the vision of mediator neutrality and the realities of biased mediator thoughts, behavior, and judgment. She challenges mediation teachers, trainers, and practitioners to "own up" to impartiality shortcomings and to undertake concrete measures to alter the ways they think and act. In the last section of the Article, she offers prescriptions to aid mediators in attaining "freedom from bias and prejudice."

In their Article, *Lawyering at the Intersection of Mediation and Community Economic Development: Interweaving Inclusive Legal Problem Solving Skills in the Training of Effective Lawyers*,⁸ Beryl Blaustone and Carmen Huertas-Noble insightfully explore the intersections between community economic development (CED) legal practice and mediation. They suggest that CED lawyers and mediators frequently engage in parallel roles and employ similar skill sets to foster creative problem solving, empower clients and client communities, and advance the interests of all the parties. In their view, both CED lawyers and mediators should engage in what the authors call "inclusive problem-solving," an overlapping skill set that includes metacognitive self-awareness; robust information gathering and focusing with clients; and reframing positions, framing issues,

7. Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71 (2010).

8. Beryl Blaustone & Carmen Huertas-Noble, *Lawyering at the Intersection of Mediation and Community Economic Development: Interweaving Inclusive Legal Problem Solving Skills in the Training of Effective Lawyers*, 34 WASH. U. J.L. & POL'Y 157 (2010).

and generating options that maximize the group's shared interest in order to increase the gains for the entire group. Using a hypothetical case study, the authors present a useful, clarifying discussion of "what we do" and "how we do it" for each of the three categories.

For Blaustone and Huertas-Noble, the cornerstone of inclusive problem-solving is metacognitive self-awareness, a deliberate process where the professional focuses on critically listening to their internal thoughts in order to control their clinical judgment. The authors are highly critical of the lack of a consistent, rigorous pedagogy for embedding in law students a metacognitive awareness that provides an internal monitor that questions the basic inclination to perceive and gather data that supports one's belief structure while neglecting evidence to the contrary and ignoring alternative interpretations.

Paul Holland's Article, *Lawyering and Learning in Problem-Solving Courts*,⁹ presents a deft and provocative analysis of the role of problem-solving courts in providing an alternative, team-based approach to dispute resolution that both provides therapeutic justice and deeply refocuses legal advocacy. Largely an innovation of the twentieth century,¹⁰ problem-solving courts are not without their critics, especially in the academy and among clinicians,¹¹ but Holland provides a different perspective that presents a strong case for the role of the academy—in the form of clinicians—to teach law students how to lawyer in a context that values social aspects of criminal activity and rehabilitation. Unlike critics of the problem-solving court and of therapeutic jurisprudence, Holland embraces this manner of dispute resolution which miraculously engages the players in an

9. Paul Holland, *Lawyering and Learning in Problem-Solving Courts*, 34 WASH. U. J.L. & POL'Y 185 (2010).

10. The first juvenile court, the prototypical problem-solving court, was established in 1899 in the last moments of the nineteenth century, and it was in the first several decades of the twentieth century that nearly every state established juvenile courts. DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING*, at xiii–xv, 23 (2004); Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, 49 JUV. & FAM. CT. J. 17, 26 (1998). And later, other problem-solving courts began to arise for prostitution, drugs, and smoking. Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL'Y 57, 60–69 (2009).

11. See, e.g., Quinn, *supra* note 10 (critiquing the problem-solving court movement); Jane M. Spinak, *Reforming Family Court: Getting It Right Between Rhetoric and Reality*, 31 WASH. U. J.L. & POL'Y 11 (2009) (critiquing the family court movement).

adversarial system in a common pursuit of remediating the problems that led to the violations of the law. This Article is an excellent example of why clinical scholarship is important, why clinicians should write, and how this work benefits the academy and the profession. In fact, Holland explicitly views clinicians as the ambassadors who can and should assess these courts even while practicing in them.

Holland provides a reflective and analytic description of the work that lawyers do in a problem-solving court and identifies best practices and barriers to that practice. At the same time, he critically examines the challenges and opportunities for clinical pedagogy when teaching students in problem-solving courts. Perhaps one of the most important contributions of this Article is Holland's insights and lawyering tips to guide lawyers in preparing themselves and their clients for non-adversarial proceedings. While conventional lawyering presents familiar guideposts for lawyer and client preparation in anticipation of an adversarial proceeding, preparing for a dispute resolution process that places all of the parties and the court on the same team might obscure the need for planning and preparation.

Kimberly Emery's Article, *Assisting Indigent Families in Conflict: A Pro Bono Test Drive for a Family Alternative Dispute Resolution (ADR) Clinic*,¹² provides a case study of the formation of a robust, interdisciplinary mediation and collaborative law clinic for families who cannot afford to purchase dispute resolution. The clinic evolved out of a pro bono project for students into an academic clinic that serves to both provide access to justice and teach students important lessons regarding justice and client autonomy. This program provides a great deal of context, preparation, and training for the students, modeling high levels of professionalism and knowledge about the social justice issues surrounding poverty, domestic violence, and access to justice.

The coupling of meditation and collaborative law alternatives for the clients also teaches the students about the wisdom of their clients

12. Kimberly C. Emery, *Assisting Indigent Families in Conflict: A Pro Bono Test Drive for a Family Alternative Dispute Resolution (ADR) Clinic*, 34 WASH. U. J.L. & POL'Y 239 (2010).

in resolving their own problems and, with counseling, choosing the best mechanism for themselves. At the same time, the students learn important lessons about how attorneys can assist clients in resolving disputes and how interdisciplinary approaches to what appear to be legal problems enhance outcomes for clients and learning opportunities for the students.

In *Why No Clinic Is an Island: The Merits and Challenges of Integrating Clinical Insights Across the Law Curriculum*,¹³ Jeff Giddings presents a case study of the attempts to integrate clinical legal education throughout the curriculum in Australia. This study is both comprehensive and instructive. It illustrates familiar challenges to teaching a broad range of professionalism and lessons regarding justice while bringing real life problems and clients into the academy. It is also instructive regarding successful and unsustainable strategies. One of the main contributions of this Article is its objectivity. Giddings notes that much of the clinical pedagogical scholarship is about the authors' own programs and lacks a certain sense of distance and skepticism. He thus provides a more detached and comparative perspective. In addition, Giddings studies the actual implementation of integration rather than the plans for such programs.

Beside these methodological benefits, Giddings' central contribution is his synthesis of the ingredients of successful integration of clinical pedagogy into the curriculum: sequencing, integration of clinical faculty into the courses, complementarities between clinic and podium courses. For Giddings, the benefits of integration inure to the students who learn reflection in action and to the clinic faculty who become more enmeshed in and central to the academy. Barriers include the difficulties in achieving economies of scale and of managing expectations. In other words, successful integration may demand more resources than the institution can sustain and may demand more of the clinical professors, who must be, in addition to teaching, of both the worlds of practice and research, while non-clinic colleagues need be engaged in teaching and scholarship, but not practice. This Article provides a road map

13. Jeff Giddings, *Why No Clinic Is an Island: The Merits and Challenges of Integrating Clinical Insights Across the Law Curriculum*, 34 WASH. U. J.L. & POL'Y 261 (2010).

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toward integration into the classroom of professional values, the notion of actual human beings, and real problems of justice.